

1 party. The Complainants are parties, you know. And
2 that's significant that we have an expert who has come
3 in and tendered his own definition of full capacity
4 poles that is different from a practical approach
5 taken by someone who is actually in the field, which
6 is the definition we're trying to proffer, is
7 significant.

8 As we said in the opening, this is the
9 tale of two cases. They've got their theory; we have
10 ours. We think ours is practical and workable. We
11 now have a representative, someone we actually deal
12 with on a day-to-day basis, who has gone out and done
13 and analysis and says, "I think three of 13 are full."

14 But yet, it gets filtered and cleansed and
15 is funneled through an expert who gets on the stand
16 and says none of their poles are full out there.

17 JUDGE SIPPEL: All right. So you got
18 evidence to the record. We haven't admitted it yet.

19 MR. CAMPBELL: That's my concern. Yes.

20 JUDGE SIPPEL: Well, do you want me to rule
21 on the admissibility first before we go to the next
22 step?

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1 MR. CAMPBELL: We tender those exhibits
2 into evidence, Your Honor.

3 JUDGE SIPPEL: Well, before I rule on it,
4 let me ask you this. If these things are received
5 into evidence, and this is evidence that could
6 arguably be, certainly the argument can be made to
7 establish that there are some, there is at least one
8 person over there at Cox who described poles as being
9 full, what in addition are you going to get by
10 bringing this person in who we don't know what the
11 heck he's going to say?

12 MR. CAMPBELL: I don't know. That's just
13 the issue.

14 JUDGE SIPPEL: Well, if you don't know
15 that's what bothers me. Because I'm not going to say
16 time is money. But, you know, time is money, and the
17 commission is paying for the rent.

18 MR. CAMPBELL: Your Honor, I'm sorry. I
19 can't project what this witness might say on the
20 stand. I think it is highly relevant that the
21 position taken by the Complainants in this case is
22 that there is no such thing full pole. Or if it is,

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1 it's some kind of unicorn out there. You might find
2 it. And here's a witness who looked at 13 and found
3 three of them.

4 JUDGE SIPPEL: What's going to happen is,
5 and I'm hypothesizing. Obviously, I don't know what's
6 going to happen. But what would happen in the real
7 world, I would think, is that somebody is going to go
8 back and tell Mr. O'Ceallaigh why he's going to be
9 brought in here to testify. And he's going to look at
10 this stuff, and he's going to be able to prepare
11 himself in terms of what he's going to testify to when
12 he comes in here.

13 And you're not going to have the
14 opportunity to depose him on this. This was maybe
15 fresh. You sprung it on Mr. Harrelson. You're not
16 going to be able to spring it on Mr. O'Ceallaigh.

17 MR. CAMPBELL: Which is the reason I didn't
18 want to go through the proffer process, the take-home
19 exam.

20 JUDGE SIPPEL: Well, what am I going to do?
21 Here's where I'm coming out on this. I'm going to
22 hear, obviously, from Mr. Seiver. But I am inclined

1 to permit this to come into evidence as cross-
2 examination material of this witness. Because I
3 certainly think it's relevant to his credibility and
4 to goodness knows what else, that this information was
5 floating around, he looked at it, and what did he do
6 with it?

7 I'm not going to characterize it, but he
8 testified what he did with it. And to take it from
9 there to the next step, I can't see where there's
10 going to be any -- I mean, it would be very
11 speculative that there's going to be something more
12 productive brought out of that exchange.

13 Because I get a funny feeling I know what
14 I'm going to hear, but I'm not going to say what that
15 is.

16 MR. CAMPBELL: I would add one more thing
17 to this issue that Mr. Seiver will have to respond to.
18 That's why I did it now.

19 There was also an issue raised in Mr.
20 Harrelson's testimony concerning some photographs that
21 had some descriptions on them. And it said, "full" or
22 other notations. We have not seen those photographs

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1 in evidence. That would be another reason why we
2 don't know what this witness is going to say. But
3 witnesses say the darndest things. You never know.

4 And we've got some photographs out there
5 that are, you know, floating around that have some
6 labels on them that we think are relevant and we sure
7 haven't seen them.

8 JUDGE SIPPEL: I'm terribly sorry, but at
9 this of this proceeding, I just can't engage, I can't
10 put the commission to the point where it's going to
11 engage in that type of speculation. Certainly if this
12 had been discovered -- and it's not your fault -- but
13 if had come out earlier, I would have certainly
14 authorized you to depose the witness. But that's
15 behind us. For the purpose of today, that's behind
16 us.

17 Can I ask Mr. Seiver now to address your
18 points. And I'm particularly interested with respect
19 to your position on these Exhibits 86 and 87
20 documents.

21 MR. SEIVER: Your Honor, our position has
22 been that despite Mr. Campbell's characterization of

1 these aren't in admission or an establishment or
2 anything nefarious. I mean, that IHOP pole was
3 discussed at deposition. There are lots more
4 photographs. Mr. Harrelson hasn't turned over 100s of
5 photographs of different poles.

6 JUDGE SIPPEL: Are those deposition pages
7 are they marked, are they in evidence?

8 MR. SEIVER: The deposition pages where --

9 JUDGE SIPPEL: You just referred to. You
10 said IHOP and all this stuff was discussed in
11 deposition.

12 MR. SEIVER: I don't know if Mr. Campbell
13 marked those particular pages.

14 MR. CAMPBELL: I can go back and look, Your
15 Honor. The picture was discussed. This document was
16 not produced.

17 MR. SEIVER: This document came out later
18 when Your Honor asked for all the different exchanges
19 between counsel about the e-mails and communications.
20 There had been some general discussions with Mr.
21 O'Ceallaigh and the 20-pole selection for Cox. And I
22 don't have Mr. O'Ceallaigh's deposition, which Mr.

1 Rollison's name came up because he was the one that
2 Mr. Harrelson said rode with him.

3 But my recollection of anything, if you
4 look at this document, and I'm not saying what Mr.
5 O'Ceallaigh would say, because I don't know what he
6 would say. But the concept of being in a full pole, I
7 think Mr. O'Ceallaigh, or at least on this document,
8 was that it needed changing as opposed to a
9 rearrangement. But I don't know.

10 JUDGE SIPPEL: What I'm asking you to do is
11 specify in a very lawyer-like fashion what your
12 objections are to receiving into evidence 86 and 87.
13 Maybe you don't have any.

14 MR. SEIVER: I will not object to those
15 going into evidence as cross-examination exhibits. He
16 wants to argue they're -- if he wants to argue they're
17 an admission, I can't stop him from arguing an
18 admission.

19 JUDGE SIPPEL: All these arguments are
20 going to come in and propose finding. I am not
21 responding to his suggestion of admission. But that
22 doesn't mean that I might not get there. He might get

1 me there. He may get me there, but not today.

2 MR. SEIVER: I understand. So if this
3 would actually relieve us, relieve Mr. O'Ceallaigh
4 from having to come to Washington to testify if we
5 just admit these, I would be glad to do that.

6 JUDGE SIPPEL: Well, I wouldn't make the
7 ruling on the basis of it being a trade-off, but I
8 think that makes my ruling a bit more reasonable. All
9 of my rulings are reasonable.

10 This is 86 and 87 marked for
11 identification. You have moved them into evidence.
12 And they are received into evidence as 86 and 87 for
13 whatever purpose counsel wishes to make of them in
14 proposed findings or if there's any other use of them
15 you wish to make with Mr. Harrelson.

16 (Whereupon, the above-mentioned
17 document was admitted into
18 evidence as Gulf Power Exhibit
19 86 and 87.)

20 But I'm not going to require Mr.
21 O'Ceallaigh to come in and testify on this for the
22 reasons that I've given.

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1 Now, can we put Mr. Harrelson back on the
2 stand?

3 MR. CAMPBELL: Could we get a
4 representation from counsel concerning the photographs
5 that apparently exist.

6 JUDGE SIPPEL: Yes, sir. I'm sorry. Yes.
7 Counsel is right. What about the photographs?

8 MR. SEIVER: I thought we had given
9 everything. I can make an effort to find those. I
10 don't know. I thought we had given everything.

11 JUDGE SIPPEL: All right.

12 MR. SEIVER: I will commit that before
13 Monday, we will have found those. And I can get them
14 electronically over the weekend or Monday morning.

15 MR. COOK: I was just saying that's
16 assuming that such things exist. Mr. Harrelson saw a
17 lot of photographs. And to our knowledge, they have
18 already been produced to the opposing side. We could
19 go back and double check is the best we can do.

20 MR. SEIVER: And when Mr. Harrelson will go
21 back to Georgia tonight, I will ask him to make sure
22 that he scours his files for those photographs, if he

1 still has them.

2 JUDGE SIPPEL: Are you going to let him go
3 home? Can he come back again Monday morning?

4 MR. SEIVER: Yes.

5 JUDGE SIPPEL: Okay.

6 MR. SEIVER: He will be here. Yes, Your
7 Honor.

8 JUDGE SIPPEL: We'll inquire about that,
9 Mr. Campbell. Now, I'm going to do my own little
10 short voir dire on Monday morning. And I'm going to
11 expect that there's been really a super search done
12 over the weekend for those photographs. And if they
13 do show up, then the witness will be on the stand, and
14 he can go into that. He can go into the documents.
15 He can go back to these admitted exhibits with Mr.
16 Harrelson until he exhausts that subject. And that's
17 as much as I'm prepared to do.

18 MR. CAMPBELL: I appreciate that, Your
19 Honor. I'm going to, I don't know if you make a
20 motion or make request or a suggestion, but it is now
21 4:00. It has been a long week and a long day. It
22 looks like we're coming back Monday morning

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1 irrespective of what happens in the next 15, 20, 30
2 minutes.

3 I think we are prepared to finish on
4 Monday without any difficulty. I would suggest that
5 we break here before I get into another lengthy topic
6 where it might be difficult to have a breaking point.

7 Again, I don't want to start a line of
8 inquiry and have the witness have the weekend to study
9 up on the rest of it.

10 JUDGE SIPPEL: All right. Do you have any
11 problem with that, Mr. Seiver?

12 MR. SEIVER: And perhaps it would be better
13 so the record is clear if we brought the witness back
14 in to explain what he needs to do. I know I'm not
15 supposed to talk to the witness.

16 JUDGE SIPPEL: I'm going to get to that,
17 but before I get to that, how about let's finish up
18 this. Do you have any objection of breaking until
19 Monday morning?

20 MR. SEIVER: I would have preferred to
21 finish today, but if that's impossible, then --

22 JUDGE SIPPEL: I'll go until 5:00. But I'm

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1 not going to go until 7:00 at night.

2 MR. SEIVER: No. It sounds like Mr.
3 Campbell wouldn't be finished anyway.

4 JUDGE SIPPEL: And he's right. I mean the
5 people have been working hard today. I am going to
6 take counsel at their word, I expect that we're going
7 to be finished on Monday.

8 MR. SEIVER: I hope before the lunch hour.

9 JUDGE SIPPEL: That's fine. That will be
10 a real plus, but I'm expecting to finish on Monday.

11 MR. CAMPBELL: I wouldn't have any problem
12 with that. We will finish on Monday.

13 JUDGE SIPPEL: And I hesitate to say
14 anything about this now, but is that specter of a
15 request for rebuttal, is that left? Or you don't want
16 to talk about it now?

17 MR. CAMPBELL: I'm not prepared to say yet.
18 I'm not to the section of inquiry with Mr. Harrelson
19 where I can do that yet. But I'm closer than I was.

20 JUDGE SIPPEL: Okay. Well, I've got my own
21 thoughts on this, but I can't say them because it may
22 inadvertently appear to prejudice somebody's position

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1 or certainly tip a hand. But I feel very strongly
2 that we do not need rebuttal testimony in this case,
3 and I'm not going to give you the reasons why.

4 MR. CAMPBELL: I understand your
5 predilections, Your Honor. What about closing
6 argument? Do you want to hear closing remarks on
7 Monday?

8 JUDGE SIPPEL: Anything you do between 9:00
9 and 4:00 on Monday is fine with me.

10 MR. SEIVER: And we don't have to use the
11 whole time?

12 JUDGE SIPPEL: No, sir. Let's bring the
13 witness back in. Okay. Off the record.

14 (Whereupon, the matter went off the record
15 at 3:58 p.m. and went back on the record at 3:59 p.m.)

16 JUDGE SIPPEL: You're still under oath,
17 sir. We're going to go back on the record. All set?

18 You are under oath. And let me just tell
19 that what transpired in your absence was a discussion
20 and maybe a tad of argument as to whether or not Mr.
21 O'Ceallaigh should come in and explain his notations
22 to you. And I have decided that we don't need to do

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1 that for the purposes of this case.

2 Point number 2 is that Mr. Campbell is
3 very concerned about the photographs with the
4 notations. You're nodding, yes. So far, you
5 understand what I'm telling you. You're going to go
6 back is it to Georgia --

7 THE WITNESS: Yes.

8 JUDGE SIPPEL: --this weekend, and then,
9 you're going to come back here on Monday morning. And
10 we're going to start at 9:00. And I'm assured by
11 counsel that they will complete your testimony by the
12 end of the day on Monday if not earlier. We're
13 shooting for earlier, that's for sure.

14 However, we want those photographs if they
15 exist. So I'm instructing you to go back to Georgia
16 and do a super search for them, because we're going to
17 ask you about them Monday morning. And if they're not
18 here, we're going to want to know what you did to look
19 for them. Okay?

20 THE WITNESS: Yes, sir.

21 JUDGE SIPPEL: And counsel certainly will
22 assist and instruct to the extent that's necessary,

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1 and will instruct you in terms of what you would do
2 and how you would do it.

3 Okay. That's it. Mr. Campbell has more
4 to cover, but we're not going to cover it today, so
5 we're going to wait until next Monday to do it. Okay?

6 THE WITNESS: Yes, sir.

7 JUDGE SIPPEL: Do you understand?

8 THE WITNESS: Yes, sir.

9 MR. CAMPBELL: Same instruction to the
10 witness will remain?

11 JUDGE SIPPEL: Thank you. You're still
12 under oath. You're still on the stand even though
13 you're in Georgia. And you're not to discuss your
14 testimony with anybody. You can discuss with counsel
15 what's happening, what might be expected, but you
16 can't discuss what you testified to or what you
17 specifically will testify to. Is that good?

18 MR. CAMPBELL: Thank you, Your Honor.

19 JUDGE SIPPEL: Anything else? We're in
20 recess until 9:00 a.m. Monday morning.

21 (Whereupon the foregoing matter went off
22 the record at 4:01 p.m.)

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Docket No. (if applicable)


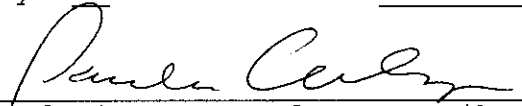
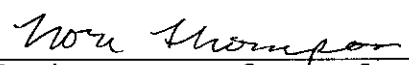
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Place of Hearing

APRIL 26, 2006

Date of Hearing

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